

Juvenile Defender Newsletter

Fall 2010

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Case Law

In May the Vermont Supreme Court heard oral argument on five consolidated cases where DCF appealed decisions of the Human Services Board overturning substantiations.. Rulings were made recently on three of these cases.

In In re RP and BP, 2010 VT 96 (October 29, 2010) the Court upheld the hearing officer's right to require that the Department provide a written offer of proof with affidavits. However it reversed and remanded the HSB's reversal of the substantiation, saying DCF should have been given the opportunity to provide that offer of proof. The Board had adopted the hearing officer's recommendations holding that DCF had not provided the offer of proof by the time the proceedings came before the Board. Thus the Board's conclusion was that "DCF failed to identify evidence to meet its burden of proof, which the Board characterized as 'a showing that the petitioners were guilty of conduct more serious than naivety, misjudgment, and lack of cynicism.'" In re RP and BP. The Court found that the Board acted prematurely in reversing DCF's substantiation decision and the remand gives DCF another chance to submit its offer of proof.

Kurt Hughes' case, In re R.H., 2010 VT 95 (October 29, 2010) was also reversed and remanded. The Court agreed with the Board's finding that "After evaluating the elements of collateral estoppel, ... applying the doctrine here would be unfair." The applicability of collateral estoppel is a question of law which the Court reviews de novo. Collateral estoppel did not apply here because a different standard was used in a subsequent proceeding. DCF used the single egregious act standard to place petitioner's name on the child protection registry. The Family Division of the Superior Court used the gross negligence standard to grant the Relief from Abuse petition. For this reason the Court found that the "petitioner is not precluded from challenging DCF's decision to substantiate her for placing [her child] at risk of harm." On the merits, "the Board applied a 'gross negligence' or 'reckless behavior' standard and determined that petitioner's actions did rise to the level of 'risk of harm.'" In re R.H. ¶12 However the Board concluded that placement on the registry would not serve any purpose, that the incident involved was "unique and out of character for the petitioner, and noted that petitioner had taken responsibility for her actions." The Board considered the risk of future harm, rather than whether the action "had caused" harm to the child. The Court emphasized that under In re Bushey-Combs, 160 Vt. 326, 329 (1993) the Legislature intended the Board to engage in de novo review of DCF's decision. DCF has to look at the facts and make a decision regarding whether to substantiate. The Board has to give deference to the interpretation DCF has given to the applicable statute/policy, but the Board doesn't have to give deference to DCF's conclusions regarding substantiation and has the authority to reach its own conclusion as to whether a report

of abuse is substantiated. The Court ruled that the Board can not employ a forward-looking analysis. Kurt hopes to prevail on remand.

The third case, In re M.G. and K.G., 2010 VT 101 (November 4, 2010) was also reversed and remanded for additional proceedings because the Court found that the Board failed to make any findings of fact on its own. The hearing officer did not make any findings of fact “but rather began his decision by stating that “[t]he following facts have been submitted by (DCF) in its Proposed Findings.” The Board, by statute, must “enter its order based on the findings “and a mere recitation of evidence in findings is not a finding of the facts.”

An Important Case from New Jersey

Delay and visitation worked in this mother’s favor in the termination of parental rights case. By the date of the Appellate Division arguments, September 22, 2010, the mother had remained drug-free, was gainfully employed and had stable housing. Both mother and her daughter (who was eight years old at the initial involvement of the New Jersey division of Youth and Family Services in December, 2006), indicated they now wanted to resume a familial relationship. The court found that termination was a less preferable option, and under NJSA. 30:4C-15.1(a) that two of the four prongs needed to satisfy for termination were not met; that the parent has been unable or unwilling to eliminate the harm, and that the termination will not do more harm than good. See In the Matter of the Guardianship of M.S., a minor, Superior Court of New Jersey, Appellate Division, 2010 N.J. Super. LEXIS 206 (October 25, 2010)

A Report from Pam Marsh on National Conference

I attended the National Association of Counsel for Children conference in Austin, TX recently. It was a very good conference, and I would be happy to share any information with any interested parties. The seminars I thought were particularly interesting were:

- Trauma Informed Legal Systems – advocating for courts taking into consideration a youth’s trauma history in delinquency and criminal proceedings. This requires attorneys representing children to obtain trauma histories (I got a couple of sample trauma history forms), and determining what kinds of evaluations might be helpful to inform the court regarding the impact of various kinds of trauma on the youth’s development and the effect it might have on the behavior bringing the youth to the attention of the court.
- A plenary session with Bruce Perry, Ph.D. – a noted psychologist, who argued that we need to completely rethink the delivery of services to the populations that we are working with. He finds trauma-informed paradigms to be incomplete. We must also look at developmentally-informed paradigms. Where children have missed out in their early development, whether due to pre-natal substance abuse, pre- or post natal neglect, abuse or substance abuse, the very structure of their brains is affected. In order to heal these children, you have to go back and give them the basic building blocks for the stages of the brain development that were interrupted. Removing the children from the bad environment and putting them into therapy

once a week won't help. To make a difference, these children need to be assessed to determine what their current developmental level is in all areas, and then they need to receive services that address their deficits in an environment that provides core elements of positive developmental, educational and therapeutic experiences that are:

- relational (safe)
 - relevant (developmentally-matched)
 - repetitive (patterned)
 - rewarding (pleasurable)
 - rhythmic (resonant with neural patterns)
 - respectful (child, family, culture)
- Two sessions involving early parental representation and peer parent advocacy programs
 - A session on by Sandeep K. Narang, M.D., J.D. on Abusive Head Trauma (shaken baby syndrome) – the literature overwhelmingly negates the validity of Professor Turkheimer's position in the NY Times Op-Ed piece that was circulated through the DG list a couple of months ago. The literature overwhelmingly supports the conclusion that subdural hemorrhaging and retinal hemorrhaging due to AHT is very different from the subdural hemorrhaging and retinal hemorrhaging due to other causes, such as automobile accidents and falls. Dr. Narang showed some pretty dramatic slides demonstrating the differences. However, at present, doctors cannot tell with precision when an AHT event occurred, the specific mechanism of the damage in the individual case, or who did the damage. They can say whether a given explanation is consistent with the observed damage.

New Generation of Caregivers

On September 10 the Washington Post reported on a 2010 study by the Pew Research Center indicating that one in 10 children in the U.S. now lives with a grandparent. The number of grandparents raising their grandchildren increased 8% since 2000. Factors contributing to this are: the economy, a nationwide effort to have children from troubled families placed with relatives instead of in foster homes; and some military parents facing multiple deployments have entrusted their children to the grandparents.

On November 11 the New York Times reported on a new Census Bureau report which stated similarly that

The number of children living in their grandparents' home increased by 8 percent compared with 2009, the second such rise in two years, and an indication that the recession is rearranging how people live.

Over all, 6.5 percent of children in the United States lived with their grandparents, a 20-year high and double the rate in 1970, said Andrew Cherlin, a professor of sociology and public policy at Johns Hopkins University, who analyzed the data. ... Of the 7.5 million children who lived with a grandparent in 2010, more than a fifth did not have a parent present in the household, the report said.

The October 2010 issue of the ABA Child Law Practice includes tips for finding and notifying relatives in child welfare cases. There is a “due diligence” standard in the Fostering Connections Act that must be met by caseworkers who must meet this requirement by making such efforts to find grandparents, or any other relative, as a “reasonable person”. Such methods include interviewing family and friends, and using the Federal Parent Locator Service (FPLS) to find absent parents who may be able to identify other relatives.

Education Matters

By Joan Rock, Resource Coordinator
Barre District Office, Family Services Division, DCF

When children come into the care of the state, it is traumatic. Regardless of what is happening in their homes, having to leave their families and familiar surroundings can be overwhelming. When foster care placement is necessary — whether it is with relatives, friends, or strangers — it is important for the professionals involved to consider the factors that should stay consistent for children (e.g., community, church, school, sports) whenever possible.

Research tells us that school stability for children in foster care is one of the most important factors to consider — second only to their safety and well-being. When children transition from one school to another, it takes approximately four to six months to recover academically as they adjust and learn to cope with their new environments (Yu, Day, and Williams, 2002). And when children are required to transition from school to school during their high school years, it reduces their chances of graduating (Rumberger, Larson, Ream, and Palardy, 1999).

With this knowledge in mind, the Barre District Office of Family Services strives to place children who cannot safely remain in their homes into homes in the same school districts. This is not always possible, however. Fortunately, the State of Vermont recognizes the importance of school stability for children in state care, and special exceptions may be made so children can stay in their schools — regardless of where they or their parents live. A Memorandum of Understanding (MOU) between the Department of Education and the Department for Children and Families outlines the process for making such requests and decisions are based on the children’s best interests.

From September 1, 2009 to September 30, 2010, there were 24 school-aged children who entered state custody in the Barre district area; 18 of them were able to stay in the same schools, while the other 6 had to change schools because they entered residential care. We will continue to monitor the educational stability of the children in our care because their success in school is critically important.

Our office has developed several tools to help professionals and children as they consider school placement:

- § A questionnaire called “Questions to Consider”; and
- § A school directory that has contact information for each school in the towns served by the District Office.

To request copies of these tools, please contact the Barre Family Services District Office at (802) 479-4260

Useful Links and Important Dates

March 28 – 21, 2011 in Huntsville, Alabama – 27th National Symposium on Child Abuse, presented by the National Children’s Advocacy Center

In case you missed the webinar entitled “Effective Approaches for Engaging Parents in the Child Protection Process” the National Center for State Courts will be posting it online at:

<http://www.ncsc.org/information-and-resources.aspx>

There were 83 people registered from 31 states for this webinar including representatives from the National Council of Juvenile Court Judges and Casey Family Services.

The ABA has a new web site in conjunction with Casey Family Programs and Generations Unites offering help for grandfamilies which can be accessed at <http://www.grandfamilies.org/>

Check the monthly on line edition of the ABA’s Child Law Practice

<http://www.abanet.org/child/clp/home.html>

Recent appellate decisions in Washington, California and New Hampshire have found that the Interstate Compact on the Placement of Children, ICPC, is inapplicable to placements with birth parents.

Here's a link to a site with ICPC resources -

<http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Pages/ICPCAdvocacy.aspx>.

Interstate Compact on the Placement of Children, ICPC, RESOURCES

Last updated on October 28, 2010

For information about the Interstate Compact on the Placement of Children and current reform efforts, visit the website of the Association of the Administrators of the Interstate Compact on the Placement of Children at: http://icpc.aphsa.org/Home/home_news.asp.

Articles

John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-Of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57 (2006)

Julian Libow, *The Interstate Compact on the Placement of Children —A Critical Analysis*, 43 JUV. AND FAM. CT. J. 19 (1992)

Judge Stephen W. Rideout, *The Promise of the New Interstate Compact on the Placement of Children*, 25 ABA CHILD LAW PRACTICE 165 (2007) available at

http://icpc.aphsa.org/Home/Doc/Rideout_on_new_ICPC.pdf

Vivek S. Sankaran, *Navigating the Interstate Compact on the Placement of Children: Advocacy Tips for Child Welfare Attorneys*, 27 ABA CHILD LAW PRACTICE 33 (2008)

Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents under the Interstate Compact on the Placement of Children*, 25 YALE L. AND POL. REV. 63 (2006)

Vivek S. Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L. QUARTERLY 435 (2006)

Caselaw

ICPC Does Not Apply To Placements With Biological Parents

McComb v. Wambaugh, 934 F.2d 474 (3d Cir. 1991)

In re Alexis O., No. 2008-133 (N.H. 2008)

Ark. Dep't of Human Servs. v. Huff, 65 S.W.3d 880 (Ark. 2002)

In re C.B., 2010 Cal. App. LEXIS 1673 (Cal. Ct. App. 2010)

In re Dimitri M., 2008 Cal. App. Unpub. LEXIS 4137 (Cal. Ct. App. 2008)

In re John M., 2006 Cal. App. LEXIS 1257 (Cal. Ct. App. 2006)

In re Alicia F., 2005 Cal. App. Unpub. LEXIS 10587 (Cal. Ct. App. 2005)

In re Kirsten T., 2005 Cal. App. Unpub. LEXIS 8617 (Cal. Ct. App. 2005)

In re Colin R., 2004 Cal. App. Unpub. LEXIS 11492 (Cal. Ct. App. 2004)

In re Markelle T., 2003 Cal. App. Unpub. LEXIS 5676 (Cal. Ct. App. 2003)

In re Johnny S., 1995 Cal. App. LEXIS 1294 (Cal. Ct. App. 1995)

Tara S. v. Superior Ct. of San Diego County, 1993 Cal. App. LEXIS 235 (Cal. Ct. App. 1993)

Dep't of Servs. for Children v. J.W., 2004 Del. Fam. Ct. LEXIS 143 (Del. Fam. Ct. 2004)

Dep't of Children and Family Services v. K.N., 858 So.2d 1087 (Fla. Ct. App. 2003) (not applicable to return of child to fit, custodial parent after child had been kidnapped by noncustodial parent)

Dep't of Children and Family Services v. L.G., 801 So.2d 1047 (Fla. Ct. App. 2001) (not applicable to interstate move of mother who already had custody of children)

In re Rholetter, 592 SE.2d 237 (N.C. Ct. App. 2004)

In re Mary L., 778 P.2d 449 (N.M. Ct. App. 1989)

ICPC Applies To Placements With Biological Parents

Ariz. Dep't of Econ. Sec. v. Leonardo, 22 P.3d 513 (Ariz. Ct. App. 1999)

Green v. Div. of Family Servs., 864 A.2d 921 (Del. 2004)

C.K. v. Dep't of Children and Families, 2007 Fla. App. LEXIS 2729 (Fla. Ct. App. 2007)

H.P. v. Dep't of Children & Families, 838 So. 2d 583 (Fla. Dist. Ct. App. 2003)

Dep't of Children & Families v. Benway, 745 So. 2d 437 (Fla. Dist. Ct. App. 1999)

In the Interest of C.N., 953 So.2d 870 (La. Ct. App. 2007)

Custody of Quincy, 562 N.E.2d 94 (Mass. Ct. App. 1990)

Adoption of Warren, 693 N.E.2d 1021 (Mass. Ct. App. 1998)

Orsborn v. Montano DPHHS, 2004 Mont. Dist. LEXIS 3524 (Mt. 19th Jud. Dist. Ct. 2004)

In the Matter of Tumari W., 2009 N.Y. App. Div. LEXIS 6669 (N.Y. Supr. Ct 2009) (but noting that ICPC may not apply if BF had filed for custody)

In the Matter of J.T., 2008 N.Y. Misc. LEXIS 7324 (Fam. Ct. N.Y. 2008)

State Juvenile Dep't of Clackamas County v. Smith, 811 P.2d 145 (Ore. Ct. App. 1991)

ICPC Does Not Apply To Visits With Biological Parents

In re Emmanuel R., 2001 Cal. App. LEXIS 3109 (Cal. Ct. App. 2001)

ICPC Does Not Apply To Placements With Relatives

Arkansas Dep't of Health and Human Services v. Jessica Jones, 2007 Ark. App. LEXIS 46 (Ark. Ct. App. 2007) (inapplicable where custody was being restored to paternal grandparents at preliminary hearing)

Commonwealth of Kentucky v. G.C., 2009 Ky. App. Unpub. LEXIS 27 (Ct. App. Ky. 2009)

In the Matter of J.E., B.E., 2007 N.C. App. LEXIS 801 (N.C. Ct. App. 2007)

N.J. Div. of Youth & Family Servs. v. K.F., 803 A.2d 721 (N.J. Super. Ct. App. Div. 2002)

In the Matter of Lisa B., 2006 N.Y. Misc. LEXIS 1735 (N.Y. Sup. Ct. 2006) (inapplicable where grandparents filed a separate custody action regarding foster children)

ICPC Applies To Placements With Relatives

In re Yarisha F., 121 Conn. App. 150; 2010 Conn. App. LEXIS 188 (App. Ct. Conn. 2010)

In re Petition of T.M.J., 2005 D.C. App. LEXIS 381 (D.C. 2005)

In re T.T.B., 724 N.W.2d 300 (Minn. 2006)

In the Matter of Ryan R., 2006 N.Y. App. Div. LEXIS 6494 (N.Y. Sup. Ct. 2006)

In re Miller, 36 P.2d 989 (Or. Ct. App. 2001)

ICPC Model Regulations Are Not Binding On States

H.P. v. Dep't of Children & Families, 838 So. 2d 583 (Fla. Dist. Ct. App. 2003)

ICPC Model Regulations Are Binding

Ariz. Dep't of Econ. Sec. v. Leonardo, 22 P.3d 513 (Ariz. Ct. App. 1999)

Green v. Div. of Family Servs., 864 A.2d 921 (Del. 2004)

Best Interest Of The Child Trumps Strict Compliance With The ICPC

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In re Christina M, 1995 Cal. App. LEXIS 682 (Cal. Ct. App. 1995)

In re Adoption 3598, 701 A.2d 110 (Md. Ct. App. 1997)

In re Adoption 10087, 597 A.2d 456 (Md. Ct. App. 1991)

N.J. Div. of Youth & Family Servs. v. K.F., 803 A.2d 721 (N.J. Super. Ct. App. Div. 2002)

State of Florida v. Thornton, 396 S.E.2d 475 (W.Va. Supreme Ct. App. 1990)

Effects of Violating ICPC

In re Matter of the Adoption of Infant H., 2009 Ind. LEXIS 339 (Ind. 2009) (reversing adoption order where trial court failed to comply with the ICPC)

In re Paula G., 672 A.2d 872 (R.I. 1996) (reversing order placing children with out of state relatives where trial court failed to comply with the ICPC).

In re Eli F., 212 Cal.App.3d 228 (1989) (reversing order placing children with out of state relatives where the court had no evidence of completion of ICPC process)

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